fits resulting from the paving improvement in question was a material and relevant issue and that under the equal protection clause and the due process of law provision of the Fourteenth Amendment to the Constitution of the United States, the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company had the constitutional right to introduce pertinent evidence and proof to overcome a rebuttable presumption of benefits arising from the Georgia statutes and ordinances authorizing the paving improvement in question and the improvement assessment ordinance made thereunder, and that the failure and refusal of the lower court to admit, receive and consider evidence and proof to show and establish a lack of benefits deprived the said Companies of the due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the State of Georgia denied the said Companies the right to offer, tender or introduce evidence to show or establish a lack of benefits from the paving improvement in question.

The amount involved in the case at bar is sufficient to bring this case to the Supreme Court of the United States by appeal.

The case at bar was a civil one in which the appellee (City of Decatur) sought to recover of appellants the sum of $13,444.66, with interest from the 31st of June, 1926, on a special improvement paving assessment made against appellants under Georgia Laws 1919, pages 934 *et seq.* and Georgia Laws 1924, pages 534 *et seq.*

Second. The decision of the Supreme Court of the State of Georgia rendered on September 30, 1935 denied appel-

lants the right to introduce evidence on a material issue in the cause and denied it the right to be heard to challenge the fact of appellants' liability or the amount of their liability for the paving assessment in question, and this was in contravention of the due process clause of the Federal Constitution.

Georgia Laws 1919, pages 934 *et seq.*, and Georgia Laws 1924, pages 534 *et seq.* (under which the paving assessment in question was made against appellants) set out the only procedure open to appellants to determine whether or not they were liable for said assessment in whole or in part.

Said Acts provide:

> "Provided that the defendant in such execution shall have the right to file an affidavit denying that the whole or any part of the amount of such execution is due, and stating what he admits to be due, if any, which amount so admitted to be due shall be paid before the affidavit shall be received, the said affidavit to be filed with the marshal of said city and when received shall be returned by him to the Superior Court of DeKalb County, and there tried and the issue determined as in cases of illegality, subject to all the penalties provided by law in cases of illegality for delay."

Under decisions of the Supreme Court of Georgia, said provision prohibits a property owner from going into court to prevent the municipality from constructing the paving improvement in question and from contesting the fact or amount of liability until the assessment execution is sought to be enforced against the property owner.

Rice v. *Mayor & Council of Macon,* 117 Ga. 401.
Wright v. *Mayor & Council of Macon,* 117 Ga. 504.
Mayor & Council of Gainesville v. *Dean,* 124 Ga. 750.
Mayor, etc., of Washington v. *Moseley,* 41 Ga. App. 439; 442.

A property owner is not entitled to be heard in advance upon the fact or the amount of the liability, or the question of benefits or confiscation resulting from the assessment.

Horkan v. *City of Moultrie,* 154 Ga. 444; 449; 450.

Appellants adopted the only course open to them to determine whether or not they were liable for the paving assessment in question, in whole or in part. The decision rendered by the Supreme Court of Georgia on September 30, 1935 denied appellants the right to introduce evidence, and denied them the right to a judicial hearing as to the fact or the amount of appellants' liability in contravention of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

Saunders v. *Shaw,* 244 U. S. 317, 319.

Georgia Railway & Electric Co. v. *City of Decatur,* — U. S. —; 79 L. Ed. 702, 705.

Third. That the Georgia statutes in question, as construed and enforced against appellants in the decision rendered by the Supreme Court of Georgia on the 30th of September, 1935 were repugnant to the Fourteenth Amendment to the Constitution of the United States.

The validity of the statutes of the State of Georgia, under which the special improvement paving assessment against appellants was made, (Ga. Laws 1919, pp. 934 *et seq.* and Ga. Laws 1924 pp. 534 *et seq.*) were drawn in question upon the ground that they were unconstitutional and repugnant to the Fourteenth Amendment to the Constitution of the United States in that they deprived appellants of the equal protection of the law and the due process of law and confiscate appellants' property in contravention of said Constitutional provisions.

In its decision rendered on September 30, 1935, the Supreme Court of Georgia held in favor of the Constitution-

ality of said Acts. The decision of the Supreme Court of Georgia, in favor of the Constitutionality of the said Georgia statutes, brings the case at bar within the jurisdictional provisions of the Act of Congress of February 13, 1925, wherein Section 237 of the Judicial Code was re-enacted (U. S. Code Ann., Title 28, Sec. 344) and the Acts of Congress of January 31, 1928 and of April 26, 1928, heretofore referred to.

Kansas City Sou. R. Co. v. *Road Imp. Dist.*, 256 U. S. 658.

See also:

Thomas v. *Kansas City Sou. R. Co.*, 261 U. S. 481.

Norwood v. *Baker*, 172 U. S. 269.

Road Improvement Dist. #1 of Ark. v. *Missouri Pac. R. Co.*, 274 U. S. 188.

Standard Pipe Line Co. v. *Miller County Highway Dist.*, 277 U. S. 160, 162.

By Act of Congress of January 31, 1928, "the writ of error in cases civil and criminal is abolished." Said Act provides that all relief which could heretofore be obtained by writ of error shall hereafter be obtained by appeal.

The Act of April 26th, 1928 made the former statutes relating to right of writ of error applicable in cases of appeal provided for in the Act of January 31, 1928.

The Act of February 13th, 1925, defining the jurisdiction of the Supreme Court of the United States and re-enacting Judicial Code Section 237 (U. S. Code Ann. 344), provides:

> "A final judgment or decree in any suit in the highest court of a State in which the decision in the suit can be had * * * where is drawn in the question of the validity of a statute of any state, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its valid-

ity, may be reviewed by the Supreme Court upon a writ of error."

The decision of the Supreme Court of the State of Georgia sought to be reviewed, was rendered on the 30th of September, 1935 and the application for appeal from said decision to the Supreme Court of the United States is presented the 21st day of November, 1935.

Respectfully submitted,

WALTER T. COLQUITT,
COLQUITT, MACDOUGALD, TROUTMAN & ARKWRIGHT,
Attorneys for Appellants.